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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1107

FRANCIS LEO CAPPAERT, MARILYN I. CAPPAERT, *et al.*,
Petitioners,

vs.

UNITED STATES OF AMERICA.

STATE OF NEVADA *ex rel.* ROLAND D. WESTERGARD,
State Engineer,
Intervenor.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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vs.

UNITED STATES OF AMERICA.

STATE OF NEVADA *ex rel.* ROLAND D. WESTERGARD,
State Engineer,
Intervenor.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Francis Leo Cappaert, Marilyn I. Cappaert, and others, your petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on December 4, 1974.

Opinion Below.

The opinion of the court below (Appendix A, pp. A1-A16) has not yet been reported.*

*All of the Appendices to the present petition are separately bound as a matter of convenience.

Jurisdiction.

The judgment of the court below (Appendix B(1), p. B1) was entered on December 4, 1974. A timely petition for rehearing was denied on January 31, 1975 (Appendix B(2), p. B2). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented.

1. Whether the severance by Congress of all land and non-navigable water on the public domain, which made all such water subject to the laws of the several arid-land states, may be nullified by automatically attaching to every setting aside of public lands an implied reservation of all underground water underlying such lands, for all federal purposes whensoever authorized.

2. Whether a proclamation setting aside public land can properly be construed to reserve all underground water underlying such land, including that derived from distant sources, for purposes not recognized by Congress until long after its date.

3. Whether, where public land was set aside in 1952 for national monument purposes under authority of an act for the preservation of antiquities passed in 1906, and thereafter, under legislation first enacted in 1966, such land is deemed primarily valuable for protecting an endangered species of fish, all of the underground water reaching the national monument from many miles distant may be held reserved for the latter purpose, where the operation of such reservation substantially damages farm land miles away, where the endangered species legislation expressly disclaimed rights to water, and where state law since 1939 had declared that beneficial rights in underground water could only be acquired by proceedings pursuant thereto.

Statutes Involved.

The state and federal statutes involved in this case are set forth in Appendix D, pages D1-D8.

Statement.

This was an action by the United States to enjoin petitioners' pumping of underground water essential for the operation of their large farm and cattle ranch. The complaint alleged that such pumping endangered the continued existence of pupfish in an underground pool many miles distant from petitioners' property. Relief was granted in the view that the setting aside, as part of an existing national monument, of the public domain in which the pool was located, operated as a reservation of all underground water for miles around, for purposes not authorized by Congress until more than a decade after the land in question was set aside.

As will appear below, the pool was reserved in 1952 under the 1906 act for the preservation of antiquities; Congress first legislated for the protection of endangered species in 1966; pupfish were first declared an endangered species in 1970; water and land on the public domain had been recognized as separated under Acts of Congress from 1866 to 1877; in 1913 Nevada had provided that all water whether above or below the surface belonged to the public; and this was followed in 1939 by further Nevada legislation providing that underground waters were subject to appropriation only under the provisions of state law.

A. The Cappaerts' Ranch.

"The Cappaerts' ranch consists of 12,000 acres, of which 4,000 acres are in cultivation. The ranch, which represents an investment of more than 7 million dollars,

has an annual payroll of more than $340,000 and employs more than 80 people. Between 1700 and 1800 head of cattle are fed on the ranch." (Opinion below, Appendix A, p. A2.) The record further shows that the Cappaerts' crops include wheat, barley, alfalfa, and Bermuda grass. [1972 Tr. 313, 314, 323, 324.]

Title to most of the ranch was obtained by petitioners' predecessors in interest prior to 1900, in consequence of selections originally made by the State of Nevada. Title to some of the land was conveyed by patents issued from 1916 to 1951. In 1969, the Cappaerts acquired over 5600 additional acres pursuant to an exchange of lands with the United States. [1972 Ex. C1-C10; 1972 Tr. 210-215, 249-273, 301-302, 310-311.]

In making up its appraisals prior to that exchange, the United States considered the availability of water on the land to be traded to petitioners. [1972 Tr. 221-222.] In consequence of concern expressed by the National Park Service that the use of water by the Cappaerts within one mile of Devil's Hole might lower the water level therein, land within that distance from Devil's Hole was excluded from the exchange. [1972 Tr. 218-220, 300.]

The land acquired by the Cappaerts in the exchange constitutes the southeast portion of their ranch, and is the best land therein. It is the only portion of the ranch that shows a profit, and hence it carries all the rest. [1972 Tr. 314, 321-322.]

B. Devil's Hole and the Pupfish.

"Devil's Hole, a part of the Death Valley National Monument, * * * consists of a 40-acre tract in which there is a deep limestone cavern.

At the bottom of the cavern there is a pool about 65 feet long, 10 feet wide, and more than 200 feet deep. There are steep rock walls on three sides of the pool, but on the fourth side there is a sloping rock shelf on which algae grows. * * *

"The Devil's Hole pupfish [*Cyprinodon diabolis*] live in this pool. These pupfish evolved after the Death Valley Lake system dried up, isolating this species of fish from its ancestral stock. The pupfish population varies from 200 in the winter to 800 after spawning in the spring and depends for its survival on the sloping rock which provides food and a spawning ground. The Devil's Hole pupfish are less than one inch long and do not exist anywhere else in the world." (Opinion below, Appendix A, p. A2.)

Death Valley National Monument was first created in 1933, and then enlarged in 1937. (Proc. No. 2028, Feb. 11, 1933, 47 Stat. 2554; Proc. No. 2228, Mar. 26, 1937, 50 Stat. 1823.) On both occasions, the Proclamation declared that the withdrawal being made was effected under the 1906 Act for the protection of American antiquities. (Act of June 8, 1906, c. 3060, 34 Stat. 225, now 16 U.S.C. §§431-433; Appendix D, pp. D1-D2.)

Pursuant to a third proclamation reciting the identical statutory authority, the 40-acre tract containing Devil's Hole—the area now in controversy—was in 1952 added to and reserved as a detached unit of the Death Valley National Monument. (Proc. No. 2961, Jan. 17, 1952, 66 Stat. c. 18, 17 Fed. Reg. 691; Appendix C, pp. C1-C3.)

Unauthorized persons were expressly warned in that 1952 Proclamation "not to appropriate, injure, destroy, or remove any feature of this addition to the monument and not to locate or settle on any of the lands thereof."

Nothing was said in the 1952 Proclamation about water rights, surface or underground.

The only mention therein of "a peculiar race of desert fish" occurs in the fourth of five preambles. The present record shows that the sponsor of the Devil's Hole reservation, Professor Carl Hubbs, "came up with the idea of pointing out the travertine deposit as a means of getting Devil's Hole set aside as part of Death Valley National Monument", inasmuch as such areas could not be created for endangered species. [1972 Tr. 154-155.]

Professor Hubbs himself stated publicly [1972 Tr. 195, 196]:

> "The first step towards habitat protection in this area was the establishment in 1952 of Devil's Hole as part of Death Valley National Monument. Interestingly, this was done ostensibly because of the unique travertine limestone formations, but not to preserve *Cyprinodon diabolis,* the unique fish inhabitant."

The first Act of Congress for the preservation of endangered species dates from October 15, 1966 (Pub. L. 89-669, 80 Stat. 926). Its Section 4(i), 80 Stat. at 929, now 16 U.S.C. §668dd(i) (Appendix D, p. D5) provided that—

> "Nothing in this Act shall constitute an express or implied claim on the part of the Federal Government as to exemption from State water laws."

This 1966 legislation was supplemented three years later by the Endangered Species Conservation Act of [December 5] 1969 (Pub. L. 91-135, 83 Stat. 275), and thereafter, late in 1973, both measures were in large part superseded and partially repealed by the Endangered Species Act of [December 28] 1973. (Pub. L. 93-205, 87 Stat. 884, 16 U.S.C. §§1531-1543.) But the repealer provision of the 1973 Act, §14, left untouched §4(i) of the 1966 measure, just quoted.

Devil's Hole pupfish, *Cyprinodon diabolis,* were first declared an endangered species on October 13, 1970. (35 Fed. Reg. 16047; 50 CRR, Part 17, Appendix D.)

The record shows that in Devil's Hole, lower than the sloping rock used for spawning, there are also three somewhat similar rocks below the surface that are also used by the pupfish, who can be found on all of them. During censuses taken in 1972 and 1973, there were more pupfish on the lower shelves than on the shelf near the surface. [1973 Tr. 135, 235-236.]

C. The Underground Water; Effects of Pumping.

The water under both the Cappaerts' ranch and Devil's Hole is collected in a large underground basin that extends over an area of 4500 square miles, underlying which there is a limestone aquifer. Some of the water comes from more than 70 miles away. [1972 Tr. 76-83.]

Any substantial pumping anywhere within the 4500 square mile aquifer will in time affect the water level in Devil's Hole. [1972 Tr. 86-88, 114-115.] The precise effect of such pumping, as the present record shows, cannot be accurately predicted even by expert hydrologists. [1972 Tr. 68-69, 115-116, 120-121, 318-320.]

A recorder in Devil's Hole measures its water level continuously; all such levels are calculated as to distance below a copper washer installed there in 1962. Hence "3.7" means a water level 3.7 feet below the marker. [1972 Tr. 21-22; 1973 Tr. 109.]

> "Between 1962 and 1968 the average water level was 1.2 feet below the marker. In 1968, after the Cappaerts began to pump, the summer water level"—they pump only from March to October—"steadily decreased: in 1970 to 3.17 feet below the marker; in 1971 to 3.48 feet and in 1972 to 3.9 feet. At these water levels large areas of the critical rock shelf are exposed. At 3.6 feet below the marker, 42 per cent of the shelf is exposed, and at 3.7 feet the exposure increases to 55 per cent. The shelf exposure decreases the algae production and limits the spawning area which in turn reduces the Devil's Hole pupfish's chance to survive." (Opinion below, Appendix A, p. A3.)

The Cappaerts' wells numbered 1, 2, 3, 4 and 6 are located on land obtained by their predecessors in title prior to 1900. [1972 Ex. D1-D11, E1-E13, F1-F23, G1-G26 H1-H6, I.] Their wells numbered 5, 16 and 17 are located on tracts obtained in the 1969 exchange with the Government. [1972 Tr. 255-257.]

If the Cappaerts are unable to pump their wells numbered 1, 2 and 17, they will be forced to close down the southeastern portion of their ranch—its only profitable part—and all that is now planted there will be lost. [1972 Tr. 321-322.]

D. Rulings Below Affecting the Water Level.

The district court's preliminary injunction, entered on June 5, 1973, required the Cappaerts to limit their pumping so that a 3.0 feet level would be attained in the Devil's Hole pool. This was modified by the court of appeals, on August 20, 1973, to require only a level of 3.3 feet, that court saying that "there is little reason to believe that the present order we now direct will result in the extinction as a species of the pupfish in Devil's Hole."

The Cappaerts appealed the preliminary injunction, as did the State of Nevada, which had been permitted to intervene as a party.

Following argument, the court of appeals on January 24, 1974, remanded the case for entry of a final judgment; such a judgment was entered by the district court on April 9, 1974, again ordering a pool water level of 3.0 feet.

Once again, petitioners and the intervenor appealed; once again, the court of appeals modified the final judgment below to permit the Devil's Hole water level to remain at 3.3 feet. It then proceeded to determine the appeals, but without further briefing or argument.

The final judgment of the court of appeals, entered on December 4, 1974, affirmed the district court's fixing of the 3.0 feet level, but remanded the case for that court "to determine whether, on the facts developed during the pendency of this appeal, the lower water level [3.3 feet] may be adequate to preserve the pupfish". (Appendix A, pp. A16-A17.)

Following denial of a timely petition for rehearing (Appendix B(2), p. B2), a motion for stay of mandate was filed with the court of appeals; that motion was granted while the present petition was passing through the press.

REASONS FOR GRANTING THE WRIT.

The dramatic aspects of this case, human and legal alike, must not be permitted to obscure the controlling circumstance that the ruling below nullifies hitherto settled doctrines of water law in every one of the arid-land states, all of whom depend for their very existence on an assured water supply, and whose aggregate extent constitutes well over one third of the entire nation's area.[1]

The dramatic human feature of the present litigation is that it does not involve, as supposed below, a contest between crass and unfeeling developers whose mercenary motivations impinge upon a rare living species struggling for survival; rather, it concerns the competing claims of two equally endangered species, Devil's Hole pupfish on one hand, individual farmers on the other. The Secretary of the Interior determined in 1970 that the pupfish were endangered; the *Statistical Abstract of the United States, 1974,* disclose (pp. 592, 596, 597) that individual farmers are not only endangered, they are actually disappearing at a rapid rate, and have been since 35 years earlier. In 1935, the country's farm population was 32,161,000; by 1970 it had fallen to 9,712,000, a decline of 70 per cent. In 1959, there were 3,236,000 individual farm operators; ten years later there were only 1,983,000, a decline of nearly 40 per cent.

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[1]The arid-land states are Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming. See *California Power Co. v. Beaver Cement Co.,* 295 U.S. 142, 155-156; Act of March 3, 1877, c. 107, 19 Stat. 377, as amended, now 43 U.S.C. §323 (Appendix D, p. D4). The aggregate area of those 13 states, 1,335,465 square miles, amounts to 44.18% of the area of the 48 continental states (3,022,260 square miles), and to 36.98% of the area of all 50 states (3,615,122 square miles). *World Almanac 1975,* pp. 709, 712.

The dramatic legal feature of this case is that the court below, by treating as simultaneously enacted every statutory provision now rearranged in the United States Code, has given retroactive effect to statutes subsequently passed, and has moreover completely overlooked the vital disclaimer of water rights written into the later Congressional enactments.

Neither of the foregoing factors, it should be needless to say, establish the significance of the ruling below for purposes of review. Rather, the factor that imperatively requires scrutiny by this Court is the incalculable harm that this ruling threatens to wreak upon the Western third of our nation. For, by unwarrantably expanding the doctrine of implied reservation of water rights, the court below has virtually nullified the long line of decisions here that recognize and give effect to the Congressional severance of land and water rights on the public domain wherever the arid-land doctrine of prior appropriation holds sway, and where the common law rule of riparian rights has been advisedly rejected.

First. By a series of enactments in 1866, 1870, and 1877, now set forth as amended in 43 U.S.C. §§321, 323, and 661 (Appendix D, pp. D2-D5), Congress effected a severance of all non-navigable waters on the public domain from the land itself, and made such waters subject to local law. The classic exposition of what was done appears in *California Power Co. v. Beaver Cement Co.,* 295 U.S. 142, decided in 1935.

Inasmuch as the teaching of that case was wholly disregarded below, quotation from the opinion appears justified (295 U.S. at 162, 163-164):

> "* * * Congress intended to establish the rule that for the future the land should be patented sepa-

rately; and that all non-navigable waters thereon should be reserved for the use of the public under the laws of the states and territories named. * * * If it be conceded that in the absence of federal legislation the state would be powerless to affect the riparian rights of the United States or its grantees, still, the authority of Congress to vest such power in the state, and that it has done so by the legislation to which we have referred, cannot be doubted.

* * *

"* * * following the act of 1877, if not before, all non-navigable waters then a part of the public domain became *publici juris,* subject to the plenary control of the designated states, including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common law rule in respect of riparian rights should obtain. * * * The Desert Land Act does not bind or purport to bind the states to any policy. It simply recognizes and gives sanction, in so far as the United States and its future grantees are concerned, to the state and local doctrine of appropriation."

A few years later, the Court in *Ickes v. Fox,* 300 U.S. 82, 95, pointed out that by the Desert Land Act of 1877,

> "if not before, Congress had severed the land and waters constituting the public domain and established the rule that for the future the lands should be patented separately. Acquisition of the government title to a parcel of land was not to carry with it a water-right; but all non-navigable waters were reserved for the use of the public under the laws of the various arid-land states."

Once again, in 1955, the Court repeated that

> "the Desert Land Act severed, for purposes of private acquisition, soil and water rights on public lands, and provided that such water rights were to be acquired in the manner provided by the law of the state of location." *Federal Power Comm'n v. Oregon,* 349 U.S. 435, 448.

By 1913 Nevada had enacted a comprehensive water code for surface water, which established a systematic and orderly procedure for procuring appropriative water rights; the pertinent provisions of that code, now set forth in ch. 533 of the Nevada Revised Statutes (N.R.S.), appear in Appendix D at p. D7. Thereafter, following this Court's decisions in *California Power Co. v. Beaver Cement Co.,* 295 U.S. 142, and in *Ickes v. Fox,* 300 U.S. 82, both *supra,* Nevada in 1939 enacted a similar code for underground water; this is now ch. 534, N.R.S., and its pertinent sections appear in Appendix D, pp. D7-D8.

It is not disputed that the United States has never availed itself of those or any other provisions of Nevada law to establish its right to the beneficial use of any underground water beneath Devil's Hole, nor that the waters now in question are plainly non-navigable.

Nonetheless, by reason of the ruling below, the United States has now been held entitled to all such underground water, inhibiting farming operations in an area potentially 4500 square miles in extent. This result follows from a vastly and in our view improperly expanded concept of the implied reservation doctrine, the notion that when the United States sets aside any public land, it impliedly reserves, for all purposes, whether then or only long afterwards authorized by Congress, not only every drop of underground water

underlying the land so set aside, but also all other underground water that may be hydraulically connected therewith, regardless of source or quantity.

If indeed the implied reservation doctrine had such an unlimited scope, then the severance of land and water and the subjection of water to state law, enacted by Congress from 1866 to 1877 and repeatedly recognized by this Court, would, very obviously, be completely nullified. For then the implied reservation doctrine would join together what Congress had advisedly put asunder.

Second. Actually and properly, the implied reservation doctrine has a far more limited scope. It was first formulated in a case involving Indians, *Winters v. United States,* 207 U.S. 564. There a treaty had effected an exchange of land, and the question was whether the arid land given the Indians pursuant thereto had been conveyed without any appurtenant water rights. Since (p. 576), "By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians", the Court construed the exchange to carry with it a reservation of water rights.

A similar result was reached in *Arizona v. California,* 373 U.S. 546, 598-599, where the Court held that when Congress created certain Indian reservations on the Colorado River—incidentally a navigable stream—it intended to reserve enough river water to irrigate the land on those reservations.

There, as in another aspect of the same case (p. 601), the Court proceeded on the footing that it was *intended* to reserve the water along with the land for Indian and other federal purposes; we emphasize the word "intended" in the cited portions of the Court's opinion.

In two more recent cases (*United States v. District Court of Eagle County,* 401 U.S. 520; *United States v. District Court for Water Div. No. 5,* 401 U.S. 527), all that was decided was that the United States had consented to be sued for adjudication of water rights pursuant to the terms of the so-called McCarran amendment, 43 U.S.C. §666. Reservation of water by the United States was assumed, and the Government was told that the scope of any such reservation was a federal question, reviewable by this Court following final adjudication by state courts. But neither opinion reflects the slightest consideration, much less decision, of the head-on conflict between the reservation doctrine and the subjection of non-navigable water to state law pursuant to Congressional mandate, as the latter was construed in *California Power,* 295 U.S. 142, *supra,* and in the cases following it.[2]

In any event, even assuming that an implied reservation of water can be spelled out of an intent clearly manifested when the public land in question is set aside, that touchstone of intent in this case would require a result directly opposite to the one reached below in the present case.

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[2]*State of Nevada v. United States,* 165 F.Supp. 600 (D. Nev.), relied on below (Appendix A, p. A6), which involved rights to underground water for a naval ammunition depot, a tract over which Nevada had ceded exclusive jurisdiction several years before its 1939 act relating to underground water (Appendix D, pp. D7-D8), may perhaps be explained on the footing of intent. But its authority is weakened by the circumstance that the judgment therein entered, adverse to Nevada, was affirmed on the wholly different ground that there was no jurisdiction to entertain the action. 279 F.2d 699 (C.A. 9).

Tweedy v. Texas Co., 286 F.Supp. 383 (D. Mont.), likewise relied on below (Appendix A, p. A6), can best be explained as another instance of protecting rights originally appertaining to Indians. On any other footing, that case, like the ruling now sought to be reviewed, runs directly counter to the rationale of the *California Power* (295 U.S. 142) line of cases here.

Third. Under accepted standards of textual interpretation and statutory construction it is simply impossible to find, as the court below did, any intent in the 1952 Proclamation (Appendix C, pp. C1-C3) to reserve for the preservation of pupfish all of the underground water seeping for many miles around into the pool on the 40-acre tract that was alone set apart thereunder.

1. To begin with, that Proclamation reserves only "the remarkable underground pool known as Devil's Hole". The Proclamation recites that it is the pool that "is of such outstanding scientific importance that it should be given special protection, and such protection can be best afforded by making the said forty-acre tract containing the pool a part of said monument", *i.e.*, the already existing Death Valley National Monument.

There is nothing in the 1952 Proclamation stating that the pupfish should be given protection; they are mentioned only in the fourth "Whereas" clause of the preamble; and of course it is well settled that, where the body of any document is clear—and there is nothing ambiguous about the 1952 Proclamation—its scope is not varied by anything in a preamble. *Price v. Forrest*, 173 U.S. 410, 427; *Yazoo Railroad Co. v. Thomas*, 132 U.S. 174, 188; *Beard v. Rowan*, 9 Pet. 301, 317.

Indeed, the present record shows that the sponsor of the Devil's Hole reservation announced publicly (1972 Tr. 195, 196) that "this was done ostensibly because of the unique travertine limestone formations, but not to protect *Cyprinodon diabolis*, the unique fish inhabitant."

Thus the sponsor himself recognized that in 1952 national monuments could not lawfully be created to protect endangered species, and that his attempt to do so was an admitted subterfuge.

2. That conclusion is fortified by the declared authority under which the President undertook to act in 1952, namely, the 1906 Act for the preservation of American antiquities, now distributed among §§431, 432, and 433 of 16 U.S.C. (Appendix D, pp. D1-D2.)

We have set out that Act in the original rather than as now found in the Code, in recognition of two settled rules of construction. First, the Code is, by its own terms, only *prima facie* the law (unless actually reenacted as positive law, which is not true of Title 16). 1 U.S.C. §204(a); see *Stephan v. United States*, 319 U.S. 423, 426. Second, in order to ascertain the true intent of Congress, subsequent codification, even when it constitutes positive law, must be disregarded. *Nye v. United States*, 313 U.S. 33; *Williams v. United States*, 327 U.S. 711.

We cannot forbear to assert that both of these fundamental canons of construction were disregarded below.

Once the 1906 Act is looked to, it becomes more than ever plain that it refers to objects of antiquity, not to living fish; for, very obviously, the latter are not suitable for what that Act contemplates, viz., "permanent preservation of public museums".

Moreover, the House Report on the 1906 Act wholly negatives the notion that any reservation thereunder should automatically include underground water for miles around. To the contrary, it expressly stated (H.R. Rep. No. 2224, 59th Cong., 1st sess.) that "The bill proposes to create small reservations reserving only

so much land as may be absolutely necessary for the preservation of these interesting relics of prehistoric times."

The underground pool, as a "unique subsurface remnant of the prehistoric chain of lakes which in Pleistocene times formed the Death Valley Lake System", is undoubtedly as much an object of unusual scientific interest as the Grand Canyon, as to which see *Cameron v. United States*, 252 U.S. 450, 455. It may well qualify as an object of antiquity. But the first authority for governmental efforts to protect living things is found in the acts for the preservation of endangered species, the first of which dates from 1966. No such authority existed in 1952.

3. We have shown above, pages 6-7, that there were three statutes for the protection of endangered species, enacted respectively on October 15, 1966, December 5, 1969, and December 28, 1973.

But for the ruling below, we would be unable to understand how anything in any of those enactments could possibly, under any theory other than the naked fiat of *ipse dixit*, affect the scope of a proclamation promulgated in 1952.

Even more remarkable than the Ninth Circuit's finding in such later legislation matter enlarging the terms of the earlier proclamation was its failure to find the provision of the later 1966 Act that expressly disclaimed the effect which it proceeded to read into that proclamation.

Section 4(i) of the first endangered species act of 1966 (80 Stat. at 929, 16 U.S.C. §668dd(i); Appendix D, p. D5) specifically states:

> "Nothing in this Act shall constitute an express or implied claim on the part of the Federal Government as to exemption from State water laws."

Yet that is precisely the effect that the court below gave to the endangered species legislation, on which it relied to reach its result. For it is plain that, once effect is given to the governing water laws of the states, see page 13, *supra*, the United States never acquired any water rights to the underground water at Devil's Hole for any purpose whatsoever.

We note once again that the repealer provision in the latest statute, Section 14 of the Endangered Species Act of 1973, did not extend to §4(i) of the 1966 Act, just quoted.

4. Interestingly enough, when petitioners' 1969 exchange of land with the government was in process, tracts within one mile of Devil's Hole were excluded because of possible adverse effect on the pupfish there, but no objection was made to the transfer of tracts farther away. [1972 Tr. 215-216, 218-220, 300.] The Cappaerts' wells numbered 5, 16, and 17 are located on land that was traded in 1969 [1972 Ex. C1], "subject to any vested and accrued water rights". But the United States in 1969 made no claim to any such rights on lands more than a mile distant from Devil's Hole. Nor were Devil's Hole pupfish declared an endangered

species prior to October 13, 1970. (35 Fed. Reg. 16047.)

5. We mention, simply to show that it has not been overlooked, Section 1 of the 1916 Act creating the National Park Service, now set out in 16 U.S.C. §1 (Appendix D, p. D6), which indeed provides that "the fundamental purpose" of national parks and monuments is "to conserve the scenery * * * and the wild life therein", and which was in consequence relied on by the court below. (Appendix A, pp. A6-A7.)

Of course, the creation of the National Park Service was intended to continue, through centralized administration, existing protection of bears and bison, deer and wildcats, and all other fauna, in national parks existing in 1916. Of course, similar protection was to be extended to new national parks thereafter formed. But in construing the scope of a proclamation issued in 1952 under authority of an act dated 1906 and never amended, it is not helpful to look to the generalized provision of a measure establishing a new agency, whose duties, then and in the future, would include the operation of many varied areas, including among others national parks, national monuments, and national historical areas, each of which represents a different public interest warranting protection.[3]

Fourth. It is appropriate to add two thoughts.

1. The threat of the implied reservation doctrine, as now applied by the court below virtually without limitation, upon land development in the arid western

[3]It is proper to point out that much of the confusion in the reasoning of the opinion below stems from the circumstance that most of its statutory citations are to "U.S.C. (1974)", without any indication of the date that the provision in question was originally enacted.

third of the country, is a serious one. As the State Engineer of Wyoming recently told the National Water Commission, "The potential impact of the Reservation Doctrine on our state is significant. At its extreme it could seriously damage existing water users, and as a minimum it creates a cloud over future water development which needs to be removed." Quoted in Moses, *Federal-State Water Problems,* 47 Denver L. J. 194, 195 (1970).

This is particularly true when, as here, underground water is in issue. As of 1963, one-fifth of the nation's entire water needs were met from underground sources, and this proportion was projected to reach one-half in the foreseeable future. And, in the semi-arid West, underground water demands and reliance are even greater. See *Appropriation and Colorado's Ground Water: A Continuing Dilemma?* 40 U. Colo. L. Rev. 133 (1967).

It is therefore unnecessary to resort to hyperbole, even in the slightest degree, to demonstrate the far-reaching effect—and significance—of the ruling below.

2. Petitioners are not insensible to the national interest in protecting and preserving endangered species. But, if they are required to contribute to such protection at the cost of substantial damage to their own lands and livelihood, then they submit that they are entitled to compensation for all such contributions. They rely on the principle enunciated by Mr. Justice Brandeis for a unanimous Court in *Louisville Bank v. Radford,* 295 U.S. 555, 602, which requires only minimal paraphrase to be fully applicable here:

> "* * * the Fifth Amendment commands that, however great the Nation's need, private property

shall not be thus taken even for a wholly public use without just compensation. If the public interest requires, and permits, the taking of property of individual farmers in order to protect the continued existence of pupfish located many miles away, resort must be had to proceedings by eminent domain; so that, through taxation, the burden of the relief afforded in the public interest may be borne by the public."

Conclusion.

The ruling below adversely affects one-third of the nation. This petition for a writ of certiorari should therefore be granted.

Respectfully submitted.

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